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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARGARET PAULINE WEIDEMAN, Plaintiff and Appellant, v. MATILDA LOUISE MISETICH, Defendant and Respondent.	B265380 (Los Angeles County Super. Ct. No. BC517084)

APPEAL from an order of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Judgment reversed; cross-appeal dismissed.

Messner Reeves, Robert B. Hinckley, Jr., and Amish Shah for Plaintiff and Appellant.

Rutan & Tucker, Richard K. Howell and Jeffrey B. Fohrer for Defendant and Respondent.

In a prior action, Margaret Pauline Weideman petitioned the probate court for an accounting of her deceased mother's revocable family trust, alleging her sister, Matilda Louise Misetich, misappropriated trust assets from 1994, when she became trustee, to 2010. The probate court denied the petition insofar as it alleged breach of trust occurring before the trustor's death in 2008, and Weideman and Misetich eventually settled the post-2008 claims.

Weideman then filed this action, alleging Misetich breached her fiduciary duties prior to 2008. The trial court granted summary judgment for Misetich on the ground that the lawsuit was time-barred. Appealing from the resulting judgment, Weideman argues a triable issue exists as to when the limitations period commenced. In a cross-appeal, Misetich argues her successful summary judgment motion should have been granted on the additional ground that Weideman's lawsuit was barred by res judicata.

We conclude the action is not barred by res judicata, and triable issues exist as to when the limitations period commenced. We therefore reverse the judgment.

BACKGROUND

In August 1992, Louie and Mileva B. Bogdanovich (called "Mileva" by the parties, a convention we will follow) established the revocable "Louie and Mileva B. Bogdanovich Family Trust." The Bogdanoviches were trustors and trustees, and Misetich was named as the successor trustee and Weideman the alternate successor trustee. The trust agreement gave the trustee the power to invest trust funds, manage securities, and exercise discretion in payment of income and principal to beneficiaries. At the death of the first spouse to die, the trustee was instructed to divide the trust estate into (1) an "Exemption Trust" and (2) a "Marital Trust," both of which would be

irrevocable and restrict distribution of income and invasion of principal to that necessary to meet the needs of the surviving spouse, and (3) a revocable "Survivor's Trust," the income and principal of which would be freely available to the surviving spouse. Upon the surviving spouse's death, the trustee was directed to distribute the trust estate equitably to the trustors' children.

In July 1994, Mileva Bogdanovich amended the trust, declared Louie Bogdanovich to be incompetent, and appointed herself and Misetich as co-trustees.

Louie Bogdanovich passed away in 1997 and Mileva Bogdanovich on June 9, 2008, at which time Misetich became the sole trustee. No sub-trust was ever created or funded.

I. Probate Proceedings—Accounting from June 2008 to Present

On November 24, 2010, Weideman petitioned the probate court for an accounting encompassing events occurring from July 1994, when Misetich became a trustee, to the present. Misetich opposed the petition in part, arguing she could not provide an accounting encompassing events occurring before Mileva died because Mileva exclusively managed the trust assets during her lifetime. The probate court granted Weideman's petition in part, ordering Misetich to provide an accounting from June 9, 2008, the date of Mileva's death, to the present.

In 2011, Misetich served an accounting that the court ultimately deemed unsatisfactory.

In November 2011, Weideman filed a document entitled "Objections to First Accounting, as Supplemented; Petition for Order," in which she objected to Misetich's accounting and sought an order determining that Misetich breached her fiduciary duties. Weideman alleged in detail that Misetich

misappropriated specific trust assets for personal use. For example, she alleged Misetich incurred on her own behalf "multiple charges to department stores, including but not limited to: Macy's; Chico's; Sears; Nordstrom; JC Penney, Crate and Barrel and TJ Maxx," and in multiple other transactions made thousands of dollars of payments and cash withdrawals for her own benefit. Weideman again sought an accounting encompassing events occurring before 2008.

The probate court suspended Misetich's powers as trustee and appointed Weideman as interim trustee but declined to order a pre-2008 accounting.

On February 25, 2013, Weideman subpoenaed pre-2008 financial records from Morgan Stanley, resulting in the production of 3,000 pages of documents containing tens of thousands of financial entries.

In a joint trial statement and in her trial brief, both filed in April 2013, Weideman again asserted her right to a pre-2008 accounting.

Weideman's petition came on for trial on April 15, 2013. At the outset, Misetich moved in limine to limit the scope of trial to post-2008 events, which Weideman opposed, arguing the trial should encompass events occurring before 2008 as well.

The court granted Misetich's motion and limited the scope of trial to post-2008 events, informing Weideman's counsel "this court is not going to allow you to expand the scope of this trial by way of objection. Right now this account, this trial is on this account for the period from June of 2008 through the end of the account. . . . [I] limited the account to the relevant period."

The trial, which was scheduled to last three days, lasted approximately an hour and a half, comprising brief testimony by Weideman and Misetich concerning the disposition of certain assets. When the issue of pre-2008

transactions continued to arise and Weideman's counsel again argued that Misetich's pre-2008 conduct should be examined, the court informed counsel, "if you're going to go down this path and you want to open up 20 years of litigation, you can kiss whatever inheritance you think you're going to have goodbye because you're going to spend it all in litigation. So you think very carefully about what path you want to go down. That's all I'm going to say about that. But if you think you're going to go back 20 years and go down discovery paths and things of that nature, think about how costly that's going to be."

The parties then stated that "in light of the court's comments and in light of some of the rulings," they would immediately settle the probate dispute. The parties then briefly conferred, after which they settled all claims "relative to the period of time commencing with and following Ms. Bogdanovich's death in June of 2008," released claims "under the operative petition," and dismissed the petition with prejudice while reserving rights to file a new action "relative to things that potentially happened before June of 2008."

II. Current Lawsuit—Pre-2008 Conduct

On August 1, 2013, Weideman filed the instant lawsuit, alleging in the operative first amended complaint that Misetich misappropriated trust funds for her own benefit before June 2008. She asserts causes of action for breach of fiduciary duty, resulting trust, equitable lien and declaratory relief.

Misetich moved for summary judgment or adjudication, arguing Weideman's claims were barred first by the applicable statute of limitations and second by res judicata. Misetich argued Weideman's claims were time-barred because they accrued in 2008 at the latest, more than three years before the lawsuit was filed. In support, she referenced numerous statements

Weideman made in court filings, discovery responses, and deposition testimony to the effect that she knew at least by 2007 that Misetich was misappropriating trust assets. Misetich argued these admissions established as a matter of law that Weideman was put on inquiry notice of her injury by 2008, but because she did not file her complaint until 2013, it was time-barred.

In opposition to the motion, Weideman argued Misetich prevented her from discovering her injury by refusing to provide either trust records or an accounting until forced to do so by the probate court in 2012. Even if she should have discovered her injury in 2008, Weideman argued, the point would be irrelevant because Misetich's wrongdoing continued into 2012, when she was finally forced out of her position as trustee.

The trial court rejected Weideman's delayed discovery argument, finding her pleadings and discovery responses showed she knew of the facts constituting her causes of action by June 2010 at the latest, when she retained an attorney to initiate the probate proceedings. Because she waited over three more years before filing her complaint, it was time-barred. The court granted Misetich's motion for summary judgment on that basis and rejected Misetich's argument that the lawsuit was barred by res judicata.

Judgment was entered accordingly, from which Weideman timely appeals and Misetich cross-appeals.

On October 20, 2016, we requested supplemental briefing from the parties regarding the doctrine of equitable tolling.

DISCUSSION

A motion for summary judgment shall be granted if all the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., §

437c, subd. (c).) A defendant meets its burden on summary judgment by showing the plaintiff cannot prove its causes of action or by establishing a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) The burden then shifts to the plaintiff to show a triable issue of material fact exists as to a cause of action or defense. (*Ibid*.)

We review a summary judgment ruling de novo, independently examining the record to determine whether any triable issue of material fact exists. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) "In practical effect, we assume the role of a trial court and apply the same rules and standards that govern a trial court's determination of a motion for summary judgment." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1258.) Summary judgment will be affirmed if legally correct, without regard for the trial court's reasoning. (*California State Electronics Assn. v. Zeos Internat. Ltd*. (1996) 41 Cal.App.4th 1270, 1275.)

I. Misetich's Cross-Appeal

Misetich purports to cross-appeal from that part of the trial court's order denying her motion for summary judgment on res judicata grounds.

An order granting summary judgment is not appealable. (*Cullen v. Spremo* (1956) 142 Cal.App.2d 225, 232.) A judgment entered after the trial court grants summary judgment may be appealed (Code Civ. Proc., § 904.1, subd. (a)(1)), but only by a "party aggrieved" (Code Civ. Proc., § 902). A successful party is not aggrieved by and cannot appeal "from a judgment in his favor solely to attack findings of the court, which if he is successful would result in new findings being made or ordered which would themselves support the judgment . . . ." (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 273.)

The trial court's order granting summary judgment has merged into the judgment, which favors Misetich. Because she is not aggrieved, she has no standing to cross-appeal from it. We therefore dismiss the cross-appeal. (*Albers v. County of Los Angeles*, *supra*, 62 Cal.2d at p. 273; *Jones v. L.A. Community College Dist*. (1988) 198 Cal.App.3d 794, 814.)

II. Weideman's Appeal

A. Limitations Period

A proceeding by a beneficiary to assert a claim against a trustee for breach of trust must be "commenced within three years after the beneficiary discovered, or reasonably should have discovered, the subject of the claim." (Prob. Code, § 16460, subd. (a)(2).) Weideman filed the instant lawsuit on August 1, 2013. The parties' main dispute below and on appeal concerns when Weideman discovered or reasonably should have discovered the subject of her claims, and thus when the three-year limitations period commenced. We need not reach this issue because we conclude commencement of the limitations period was tolled during the pendency of the probate action.[1]

B. The Doctrine of Equitable Tolling

"The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. [Citations.] It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' [Citation.] Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' [Citation.] [¶] Though the doctrine

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[1] Because we need not reach the delayed discovery issue, Weideman's request for judicial notice of documents that purportedly prove delayed discovery is denied.

operates independently of the language of . . . codified sources of statutes of limitations [citations], its legitimacy is unquestioned. We have described it as a creature of the judiciary's inherent power "'to formulate rules of procedure where justice demands it.'" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99-100 (*McDonald*).) Equitable tolling applies "'"[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.'" [Citation.] Thus, it may apply . . . where a first action, embarked upon in good faith, is found to be defective for some reason." (*Id.* at p. 100.)

"'[A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.' [Citations.] The 'injustice to the plaintiff occasioned by the bar of his [or her] claim' must be balanced against the policy underlying the statute of limitations." (*Stalberg v. Western Title Insurance Company* (1994) 27 Cal.App.4th 925, 932.)

The record before us supports equitable tolling. Weideman possessed colorable claims that Misetich breached trustee duties both before and after Mileva's death. She proceeded in a timely fashion on those claims in the probate court and gave Misetich notice. Because Weideman acted reasonably and in good faith in pursuing the probate proceedings, equity favors tolling the limitations period unless prejudice will result.

We perceive no possible prejudice to Misetich, and she identifies none. Weideman's complaint was filed less than four months after the probate case settled, and nothing in the record suggests the delay caused any evidence to be lost. On the contrary, Misetich has been on notice ever since 2008 that an accounting would be required, and knew from at least 2010 that the accounting could involve pre-2008 events. She therefore had ample

opportunity to identify and secure the needed evidence and preserve it against dissipation.

For these reasons, we conclude that the policy behind the statute of limitations does not outweigh the injustice that would result from Weideman's loss of her causes of action.

Misetich argues Weideman cannot invoke the doctrine of equitable tolling because she made no mention of the theory in her first amended complaint. The argument is without merit. To benefit from equitable tolling, a plaintiff need not specifically mention the theory in her complaint, she need only "specifically plead facts which, if proved, would support the theory." (*Mills v. Forestex Co*. (2003) 108 Cal.App.4th 625, 641.) Misetich identifies no factual deficiency in the first amended complaint. Weideman alleges Mileva died on June 9, 2008, Weideman petitioned the probate court for an accounting in November 2010, and Misetich had notice of the probate proceedings. These facts, if proven, support equitable tolling.

Misetich argues a party may not on appeal rely on a theory not advanced at trial. We disagree. "'"[A] party to an action may not for the first time on appeal change the theory upon which the case was tried."' [Citation.] However, an exception to the general rule is recognized where the question presented is one of law. [Citations.] A legal argument may be raised for the first time in a new trial motion or on appeal "'so long as the new theory presents a question of law to be applied to undisputed facts in the record.'"' (*Cal Sierra Construction, Inc. v. Comerica Bank* (2012) 206 Cal.App.4th 841, 850-851.) The question whether triable issues exist as to whether the applicable limitations period here is tolled during the pendency of the prior probate proceedings is one of law based on undisputed facts. It is therefore properly before us.

Misetich argues equitable tolling applies only to successive claims brought in different forums, not to claims brought in the same forum. The argument is without merit. (See, e.g., *Bollinger v. National Fire Ins. Co.* (1944) 25 Cal.2d 399, superceded by statute on another point as stated in *American Broadcasting Cos. v. Walter Reade-Sterling, Inc.* (1974) 43 Cal.App.3d 401, 406 (*Bollinger*) [equitable tolling applied where plaintiff filed timely first lawsuit followed by untimely second lawsuit, both in superior court].)

Misetich argues Weideman cannot establish the elements of equitable tolling. We disagree.

For equitable tolling to apply, "(1) the plaintiff must have diligently pursued his or her claim; (2) the fact that the plaintiff is left without a judicial forum for resolution of the claim must be attributable to forces outside the control of the plaintiff; and (3) the defendant must not be prejudiced by application of the doctrine (which is normally not a factor since the defendant will have had notice of the first action)." (*Hull v. Central Pathololgy Service Medical Clinic* (1994) 28 Cal.App.4th 1328, 1336.) Here, Weideman filed a timely probate petition seeking an accounting that encompassed both pre- and post-2008 events. For reasons that are not clear, the probate court limited the accounting to post-2008 events. Weideman thereafter on multiple occasions asked the court to rescind the limitation. She first filed a modified petition for an accounting, which the court rejected, apparently because Weideman attached objections to it. Weideman then filed a joint trial statement and then a trial brief, seeking in both to expand the scope of the accounting to pre-2008 events. And at trial she repeatedly argued that the accounting should encompass pre-2008 events. All to no avail. A triable issue exists as to whether these efforts were diligent.

Misetich argues Weideman's efforts were deficient as a matter of law because she failed to seek reconsideration or appellate review of the probate court's order. The argument is without merit. As discussed, Weideman sought reconsideration of the court's order several times, and she was not required to seek appellate review. (See, e.g., *Bollinger*, *supra*, 25 Cal.2d at p. 411 [plaintiff seeking equitable tolling in a second action "should not be deprived of a trial on the merits because he failed to seek other remedies in [the first action]"].)

"Under the circumstances it would be a perversion of the policy of the statute of limitation to deny a trial on the merits. . . . 'Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put an adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to prevail over the right to prosecute them. . . . Under the circumstances of the present case it would be manifestly unjust for this court to prevent a trial on the merits, which the law favors . . . ." (*Bollinger*, *supra*, 25 Cal.2d at pp. 406-407, citations omitted.)

Misetich argues that even if the limitations period is tolled in this action, Weideman's complaint is still time-barred because the period began to run when Weideman first became aware in early 2007 that Misetich was allegedly misappropriating trust funds, yet did not file her probate petition until November 2010. The argument is without merit. The beneficiary of a revocable trust gains standing to sue the trustee for breach of duties owed to the settlor only after the settlor's death. (*Estate of Giraldin* (2012) 55 Cal.4th

1058, 1076 [beneficiaries enjoy standing "to assert, after the settlor's death, a breach of the duty the trustee owed the settlor to the extent that breach harmed the beneficiaries"].) Weideman gained standing to assert that Misetich breached her fiduciary duty to Mileva only after Mileva's death on June 8, 2008. Therefore, her causes of action accrued on that date at the earliest. She filed her probate petition approximately 29 months later, in November 2010, and those proceedings lasted 15 months. They were dismissed in April 2012, and Weideman filed this lawsuit four months later, in August 2012. The length of time from June 2008 to August 2012, not counting the 15 months of probate proceedings, is 33 months, just short of the three-year limitations period.

C. Res Judicata

Misetich argued below that the probate proceedings are res judicata to this lawsuit. We disagree.

The doctrine of res judicata operates to bar multiple litigation "arising out of the same subject matter of a prior action as between the same parties or parties in privity with them." (*Gates v. Superior Court* (1986) 178 Cal.App.3d 301, 308; see *id*. at p. 311; *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1299.) "[W]here the causes of action and the parties are the same, a prior judgment is a complete bar in the second action." (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 201.)

Here, Weideman alleges Misetich breached her trustee duties before June 8, 2008. The probate proceedings expressly concerned only breaches occurring after June 8, 2008. Therefore, Weideman's claims were not actually litigated in the probate proceedings.

Misetich argues res judicata applies not only to claims that were actually litigated but also to those that could have been litigated. Because

Weideman could have litigated her pre-2008 claims in the probate action, Misetich argues, she is barred from bringing them here. The argument is without merit.

It is well established that a judgment is binding not only as to a claim actually raised but also as to those matters that might have been raised in support of the claim actually raised. (E.g., *Price v. Sixth District Agricultural Assn.* (1927) 201 Cal. 502, 511; *Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 724-725; *Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 590.) "In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto." (*Price v. Sixth Dist. Agricultural Assn.*, *supra*, 201 Cal. at p. 511.) "If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable." (*Sutphin v. Speik*, *supra*, 15 Cal.2d at p. 202.)

Here, it cannot be fairly said that Weideman's pre-2008 claims could have been raised in the probate proceedings for the simple reason that the probate court refused to countenance them. From her first petition to her last argument at trial, Weideman tried at least six times to assert pre-2008 claims, to no avail.

Misetich argues Weideman should have moved for reconsideration of the probate court's order, but it appears she did so in one form or another on

multiple occasions, and nothing in the record suggests any other sort of attempt would have been more fruitful.

DISPOSITION

The judgment is reversed. Each party is to bear her own costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.